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No. 99-5525

In the Supreme Court of the United States

CHARLES T. DICKERSON,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF WASHINGTON LEGAL FOUNDATION IN PARTIAL SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts, Ave., NW
Washington, DC 20036
(202) 588-0302

Paul G. Cassell
(*Counsel of Record*)
University of Utah
College of Law
332 S. 1400 E. Front
Salt Lake City, UT 84112
(801) 585-5202

Counsel for Amicus Curiae

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INTERESTS OF AMICUS CURIAE[1]

The Washington Legal Foundation (WLF) is a national, nonprofit public interest law and policy center, with supporters in all fifty states. WLF participates in litigation and administrative proceedings affecting the broad public interest, including criminal justice reform and the rights of crime victims. With the consent of both parties, WLF participated as an amicus in the court of appeals in this case both by filing a brief and presenting oral argument. The Fourth Circuit adopted WLF's arguments on the applicability of 18 U.S.C. § 3501 as the basis for of its holding. *See United States v. Dickerson*, 166 F.3d 667, 680 & n.14 (4th Cir. 1999) (noting WLF's briefing and participation in oral argument). WLF has also pressed Section 3501 before this Court. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (noting WLF's briefing raising Section 3501).

WLF urges the Court to grant certiorari only on the first question by petitioner Dickerson: whether 18 U.S.C. § 3501 is the governing law on the admissibility of confessions in federal court. WLF believes the court of appeals correctly ruled that the admissibility of Dickerson's confession was governed by Section 3501. Nonetheless, the court's decision that Section 3501, rather than *Miranda*'s exclusionary rule, is the governing law on that

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for a party in this case authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation and submission of this brief. Written consents for the filing of this brief by the parties have been lodged with the Clerk.

issue presents an important question of federal law that should be resolved by this Court.[2]

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[2] Dickerson also asks this Court to grant the writ to review whether the court of appeals erred in applying Section 3501 because, Dickerson argues, it was barred from doing so under Fed. R. Crim. P. 52 (permitting appellate review of an issue not presented to the district court only for plain error). Cert. Pet. at 15. This Court should not grant certiorari on this subsidiary question. In the first place, the case in fact presents no Rule 52 issue, because the government did raise Section 3501 in the district court in its Motion for Reconsideration. *See Dickerson*, 166 F.3d at 680. It later abandoned the argument in the court of appeals, but at that juncture Rule 52's "plain error" standard, designed to prevent reversals on grounds not initially raised in the district court, no longer had any bearing on the court of appeals' authority to reach the Section 3501 question.

Moreover, the United States did appeal the district court's ruling on the admissibility of the confession. At that point, the Fourth Circuit's decision that it should determine what law governed that question before deciding it, was surely, at a minimum, permissible. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals"). The Fourth Circuit's decision to reach the issue is, indeed, squarely supported by this Court's conclusion in *United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993), that the court below had properly considered the question whether a statute had been repealed even though neither party had argued it, since the parties could not prevent the court from deciding the case under the truly governing law simply by stipulating to a different law. *Cf. Young v. United States*, 315 U.S. 257, 259 (1942) ("the proper administration of the criminal law cannot be left merely to the stipulation of parties").

Finally, the question of the status of Section 3501 is undoubtedly properly before *this* Court. "It suffices for [this Court's] purposes that the court below passed on the issue presented, particularly where the issue is * * * in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal citations omitted); *accord Cohen v. Cowles Media Co.*, 501 U.S. 663, 667- 668 (1991). The status of Section 3501 presents a purely legal issue, and the record in this case contains all the information necessary for this Court to render judgment. *Cf. Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) ("As far as I am concerned, such a time [for reaching the merits of Section 3501] will have arrived when a case that comes within the terms of this statute is next presented to us."). Given the importance and complexity of this principal question, it is well worth avoiding secondary questions in the briefing and argument.

STATEMENT OF THE CASE

The facts of the case are fully recounted in the opinion below, *see United States v. Dickerson*, 166 F.3d 667, 674-77 (4th Cir. 1999), upon which WLF relies.

REASONS FOR GRANTING THE PETITION

WHETHER 18 U.S.C. § 3501 OR *MIRANDA*'S EXCLUSIONARY RULE GOVERNS THE ADMISSIBILITY OF CONFESSIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT

The Court should grant the petition with respect to 18 U.S.C. § 3501 to end the present uncertainty about whether Section 3501 governs the admissibility of custodial confessions in federal court — as the Court has twice

stated, *see Davis v. United States*, 512 U.S. 452, 457 n.* (1994) (*quoting United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994)) — or whether the automatic exclusionary rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), does so. Acting in the absence of legislation, the Court promulgated *Miranda*'s sweeping exclusionary rule as a prophylactic measure extending beyond the requirements of the Constitution to reduce the risk of potential Fifth Amendment violations. This extraconstitutional rule of exclusion continues to control in most federal courts in the teeth of a later Act of Congress requiring a more refined approach. Whether Section 3501 or *Miranda*'s exclusionary rule provides the standard for the admissibility of confessions is a question of federal law on which the courts of appeals have adopted conflicting approaches and one that has not been, but should be, settled by this Court.

The Court should also grant review because it is the proper authority to clarify the basis for the exclusionary rule devised by the *Miranda* Court, and the related question whether Congress properly may modify that rule. In particular, this Court should clarify the relationship between its own authority to devise remedies that assist in protecting (but are not required to protect) a Constitutional right, and Congress's authority to modify those remedies in a way that fully protects the underlying right while reducing the serious social costs imposed by the judicially-devised regime sweeping more broadly than the Constitution requires.

1. The court of appeals upheld Section 3501 against a constitutional challenge, ruling that Section 3501, rather than *Miranda*'s exclusionary rule, is the law governing the admission of custodial confessions into evidence at federal criminal trials. In two recent cases, *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997); *United States v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1256 (D. Utah 1999), the U.S. District Court for Utah agreed, relying in part on the decision of the Tenth Circuit to the same effect. *See United States v. Crocker*, 510 F.2d 1129, 1136-38 (10th Cir. 1975) (alternative holding). But the Act of Congress continues to be all but ignored in the other circuits, which routinely decide the admissibility of custodial confessions under *Miranda*'s exclusionary rule without any reference to Section 3501's superseding standard.[3]

Moreover, if Section 3501 is in fact the governing law, the lower courts' failure to follow it rather than *Miranda*'s exclusionary rule has real and serious consequences. It "has caused the federal judiciary to confront a host of '*Miranda*' issues that might be entirely irrelevant under federal law * * *. Worse still, it may have produced * * * the acquittal and the non-prosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." *Davis v. United States*, 512 U.S. 452, 465-66 (1994) (Scalia, J., concurring). A decision by this Court is warranted in order to resolve this matter of recurring and first-rank importance.

2. The question whether *Miranda*'s exclusionary rule or Section 3501 governs the admissibility of confessions

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[3] The Ninth Circuit's two-sentence conclusion in *United States v. Cheely*, 21 F.3d 914, 923 (9th Cir. 1994) that Section 3501 does not "trump" *Edwards v. Arizona*, 451 U.S. 477 (1981) is the closest any other court of appeals has come to acknowledging any possible effect of Section 3501 on *Miranda*'s exclusionary rule.

turns on whether *Miranda*'s exclusionary rule is constitutionally required. If it is, then plainly Congress cannot change it. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). If it is not — if instead it is, as the Court often has stated, a judicially-devised remedy that "serves" the Fifth Amendment but "sweeps more broadly than the Fifth Amendment itself," *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) — then it is equally plain that Congress does have the power to modify it, *see Palermo v. United States*, 360 U.S. 343 (1959), at least so long as the remedial regime that Congress substitutes continues fully to honor what the Constitution requires.

The court below determined that *Miranda*'s exclusionary rule is not constitutionally required, and that Section 3501 is such a permissible modification. In WLF's view, both conclusions are correct. Both, however, are issues that only this Court is capable of resolving authoritatively.

a. That *Miranda*'s exclusionary rule is not constitutionally required is both the better reading of the *Miranda* opinion and the only view of it consistent with the rest of this Court's and the lower federal courts' law on custodial confessions. The *Miranda* Court itself stated that it had no intention of "creat[ing] a constitutional straitjacket which will handicap sound efforts" in Congress and among the States to devise their own measures against compelled self-incrimination, "while promoting efficient enforcement of our criminal laws." *Miranda*, 384 U.S. at 467. These statements are impossible to explain if the Court believed the specific rules it announced were ordained by the Constitution.

To the extent *Miranda* is ambiguous on the question, however, the Court's later cases establish that the Constitution requires neither the *Miranda* warnings, nor the rule established there that unwarned confessions must be excluded even when they are voluntary. Rather, *Miranda*'s rules are "prophylactic," put forth as "a series of recommended procedural safeguards," *Davis v. United States*, 512 U.S. at 457-458, that are "not themselves protected by the Constitution" and are "not constitutional in character," *Withrow v. Williams*, 507 U.S. 689, 690-691 (1993). The Court has also stated pointedly that *Miranda*'s exclusionary rule "sweeps more broadly than the Fifth Amendment" and that its "preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Elstad*, 470 U.S. at 306-07.

Moreover, the Court has relied on the non-constitutional status of *Miranda*'s exclusionary rule in various contexts in refusing to suppress unwarned or imperfectly warned custodial confessions and their fruits.[4] Most important in this regard are a trio of cases in which the Court made an exception to *Miranda*'s exclusionary rule and allowed the admission into evidence of un-Mirandized but voluntary confessions. In *New York v. Quarles*, 467 U.S. 649, 654 (1984), the Court ruled that an incriminating statement obtained as a result of a police question, "Where's the gun?," asked of a rape suspect they

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[4] *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 307 (1985); *New York v. Quarles*, 467 U.S. 649, 654 (1984); *Oregon v. Hass*, 420 U.S. 714, 720-24(1975); *Michigan v. Tucker*, 417 U.S. 433, 444-52 (1974); *Harris v. New York*, 401 U.S. 222, 223-25 (1971).

had just captured, was admissible despite the failure to give *Miranda* warnings. Similarly, in *Harris v. New York*, 401 U.S. 222, 224 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Court held that confessions obtained in violation of *Miranda* could be used to impeach the testimony of a defendant who took the stand at his trial.

The basis the Court gave for these rulings was that *Miranda*'s exclusionary rule is not constitutionally required. The Court was therefore free to allow other policy considerations to take precedence over that rule, which rested merely on *Miranda*'s policy decision to bolster the Fifth Amendment's right against self-incrimination with an additional layer of prophylactic protection. *See Quarles*, 467 U.S. at 657 n.7 ("absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of evidence that results from police inquiry of this kind * * * "); *Hass*, 420 U.S. at 721-24; *Harris*, 401 U.S. at 224-26.

The competing theory of *Miranda*'s exclusionary rule — that un-Mirandized confessions are excluded because the failure to give the suspect his warnings means his confession is necessarily "compelled" as that term is used in the Fifth Amendment — cannot possibly be squared with these decisions. Under that reading, *any* use of an un-Mirandized confession at trial, including the ones allowed in *Quarles*, *Harris*, and *Hass*, would also have to be barred, since those uses too would amount to "compelled" self-incriminating testimony. And, indeed, the Court has concluded that the Fifth and Fourteenth Amendments do require the exclusion of involuntary confessions even for impeachment purposes, distinguishing *Harris* and *Hass* as involving confessions obtained as a result of mere *Miranda*, rather than constitutional, violations. *See New Jersey v.*

Portash, 440 U.S. 450, 458-59 (1979); *Mincey v. Arizona*, 437 U.S. 385, 397 (1978). Accordingly, the Court's admission of un-Mirandized statements in *Quarles*, *Harris*, and *Hass* proves that *Miranda*'s rule excluding unwarned but voluntary confessions is *not* required by the Constitution. That is the starting point from which to analyze Congress's authority to adopt Section 3501.

b. *Miranda*'s exclusionary rule is best understood not as a constitutional command, but as an exercise of this Court's authority to improvise a remedy when it is presented with an issue implicating a constitutional right for which there is not at the time of the decision a constitutionally or legislatively specified remedy. *See Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971); *Mapp v. Ohio*, 367 U.S. 643 (1961). The judicially devised remedy may sweep more broadly than is strictly necessary to vindicate a particular constitutional right. *Bivens*, 403 U.S. at 397; *cf. id.* at 406-08 (Harlan, J., concurring). This devising of interstitial remedies not themselves required by the Constitution, but designed to assist in protecting constitutional rights, has become known as the Court's power to create "constitutional common law." *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Because the Court has crafted such remedies to protect constitutional rights against the States as well as against the federal government, *see, e.g., Mapp*, 367 U.S. 643, this understanding of *Miranda*'s exclusionary rule is entirely consistent with its application to the States.

c. If, as the Court's cases establish, *Miranda*'s exclusionary rule was not constitutionally compelled but was instead an exercise of the Court's power to improvise a prophylactic measure to assist in protecting a

Constitutional right, it follows that Congress has power to modify the Court's remedial scheme. *Cf. Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). The existence of such a residual power in Congress is, for example, presumed throughout *Bivens*, 403 U.S. at 397; *id.* at 406-08 (Harlan, J., concurring), and lies at the heart of this Court's later holding in *Bush v. Lucas*, 462 U.S. 367 (1983). In that case, the Court refused to allow a "*Bivens*" remedy for money damages in an action brought by a federal employee alleging a breach of his First Amendment rights, because Congress, by statute, had provided for a different remedy. *Id.* at 377. Moreover, whatever the outer constitutional limits of Congress's power may be in this context, it is plain that Congress acts within them so long as the remedial scheme it establishes provides "meaningful" relief for any actual constitutional violation. *See Lucas*, 462 U.S. at 386; *id.* at 372; *Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988).

d. Replacing *Miranda*'s automatic exclusionary rule with Section 3501's regime was a proper exercise of such Congressional authority. Under Section 3501, compelled custodial statements remain inadmissible in all circumstances. Hence, Section 3501 leaves intact the core holding of *Miranda*: that the prohibition against compelled self-incrimination extends beyond in-court statements to regulate any use at trial of a defendant's pre-trial custodial statements. Indeed, the relief the statute affords for an *actual constitutional violation* involving such statements is *identical* to the relief afforded by *Miranda*. That is sufficient *per se* to establish the statute's propriety.

But there is more. Section 3501 also preserves much of the prophylactic value of *Miranda*'s exclusionary rule, albeit through a slightly different and more refined

mechanism. As the Court below noted, Section 3501 continues to provide a strong incentive for police to advise suspects of their "Miranda rights." *See Dickerson*, 166 F.3d at 692. The statute does this by making use of the police's eventual need to secure a favorable judicial decision on admissibility concerning the fruits of their questioning — the same instrument the *Miranda* Court used — to create that incentive at the police station.

Section 3501's approach differs from *Miranda*'s on only one point. Instead of requiring automatic exclusion of a confession not preceded by warnings, Section 3501 provides that the district court is to make the admissibility determination by deciding whether the confession was, in fact, voluntary. In making this determination, the court is required by the statute to consider, not as the sole factor but as a prominent one, whether the warnings were given.

Thus, Section 3501 is not only fully adequate to vindicate the actual constitutional right against compelled self-incrimination -- compelled statements remaining banned in all circumstances -- but, through its framework for determining voluntariness, preserves a significant portion of *Miranda*'s prophylactic protections for suspects in custody. In so doing, the statute does not simply restore the legal status quo ante but goes significantly beyond pre-*Miranda* voluntariness law. *See* FRED GRAHAM, THE SELF-INFLICTED WOUND 324 (1970) ("parts of [Section 3501] would have been a progressive expansion of suspect's rights if Congress had passed it prior to *Miranda*"). Indeed, one of the Section 3501 factors goes beyond not only pre-*Miranda* case law, but beyond current *Miranda* and Fifth Amendment doctrines. The statute directs the district court to consider whether the "defendant knew the nature of the offense with which he was charged or of

which he was suspected at the time of the confession." 18 U.S.C. § 3501(b)(2). This requirement extends further than existing *Miranda* and Fifth Amendment case law, which makes clear that such inquiry by the trial court is *not* routinely required in order to assess the voluntariness of a suspect's confession. *See Colorado v. Spring*, 479 U.S. 564, 577 (1987) (suspect's awareness of all the crimes about which he may be questioned is not relevant to determining the validity of his decision to waive the Fifth Amendment privilege).

The unmistakable prominence that *Miranda* warnings enjoy in Section 3501 means that, if this Court were to uphold the statute, federal law enforcement officers would almost certainly continue to give them. That, indeed, is what amicus understands has been happening in the five States that comprise the Fourth Circuit since the *Dickerson* ruling earlier this year. Thus, the lower court's opinion has produced an enviable "win-win" situation in that (1) federal law enforcement officers continue to deliver the *Miranda* warnings, while (2) in cases with technical disputes over *Miranda* compliance (this case being a prime example, *see* 166 F.3d at 673-77) the statement will be admitted — so long as it was voluntary — but excluded if it was not.[5]

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[5] If, contrary to our view, the Court believes the effectiveness of Section 3501's extraconstitutional deterrent is important, it may wish *not* to grant certiorari in this case. Allowing the Section 3501 regime to operate for several years in the Fourth Circuit would permit the Court to make an informed judgment on that question. This Court has repeatedly emphasized that the *Miranda* rules rest on cost-benefit calculations. *See, e.g., Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986). Yet those calculations have not had the benefit of empirical study. *Cf. Miranda*, 384 U.S. at 524 (Harlan, J., dissenting) (urging legislative solutions to regulating police interrogation that would "have the vast advantage of empirical data and comprehensive study . . . [and] would allow experimentation and use of solutions not open to the courts"). Leaving the Fourth Circuit's ruling undisturbed would allow development of a firm, empirical basis for determining the costs and benefits of differing approaches to the issue.

e. The foregoing demonstrates that even without considering other features of post-*Miranda* federal law, Section 3501's rule of case-by-case admissibility determinations is a *constitutionally* sufficient alternative to *Miranda*'s rigid rule — a rule barring the use of every unwarned confession regardless of how minor or innocent the police error was, or how close a question it is whether there was an error, or, most importantly, regardless of how powerful the evidence is that, despite any error, the defendant's statement was in fact voluntary and admissible under the *Constitution*'s standards.

Were there any doubt on the matter, however, the statute's constitutionality is even clearer when Section 3501 is considered against the backdrop of all federal law bearing on the issue of questioning by federal agents. The interrogation practices of federal law enforcement officers are addressed not solely in Section 3501, but also by other federal statutes and related bodies of law that provide the possibility of criminal, civil, and administrative penalties against officers who coerce suspects. Almost all of this law was created or significantly expanded after *Miranda*, and has made the legal incentives for non-coercive police questioning almost unrecognizably greater than when *Miranda* was decided.

For example, officers who forcibly extract confessions are now subject to criminal sanctions under 18 U.S.C. §§ 241, 242 (provisions which were originally adopted during Reconstruction, but vastly expanded since *Miranda* through judicial interpretation); civil actions under *Bivens* (decided in 1971); and administrative remedies (internal disciplinary rules of various agencies). Furthermore, the officers' employing federal agencies are subject to civil actions under the Federal Tort Claims Act (28 U.S.C. § 2680(h)) (amended in 1974 to cover relevant acts or omissions of federal law enforcement officers). At the same time, the legal landscape today — if Section 3501 is implemented — allows voluntary confessions to be used in evidence (18 U.S.C. § 3501).

This is an entirely reasonable and, in many ways, a more effective approach to securing respect for the values of the Fifth Amendment than *Miranda's* extraconstitutional exclusionary rule. Unlike *Miranda*, the criminal and civil sanctions adopted by Congress and the *Bivens* actions recognized by the Court focus on conduct squarely implicating the Fifth Amendment proscription against "compelled" self-incrimination. At the same time, they provide stronger remedies against federal agents who coerce confessions than does the *Miranda* exclusionary rule. The exclusion of evidence "does not apply any direct sanction to the individual official whose illegal conduct" is at issue. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Civil suits and internal disciplinary actions constitute "sensible and reasonable steps to deter [Fifth] Amendment violations by [federal] officers, and this make the likely additional deterrent value of [the *Miranda*] exclusionary rule small." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). Similarly, the FTCA remedy provides a strong incentive

for federal agencies to make sure that their agents hew to Fifth Amendment lines. As a result, the remedial regime that exists now, 33 years after *Miranda* -- including Section 3501 -- is fully consistent with *Miranda*'s statement that "[w]e encourage Congress . . . to continue [its] laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." 368 U.S. at 467. *Cf. Bush v. Lucas*, 462 U.S. 367, 388-90 (declining to create judicial remedy because of congressional action).

f. Finally, given the substantial change in the legal and remedial landscape, and the equally substantial improvement in police professionalism, it is significantly less likely now than it was when *Miranda* was decided that unwarned custodial questioning will produce a "compelled" statement. Moreover, there are probably few people in the country today who are unaware of the rights the *Miranda* Court thought they needed to be told about before police questioning. For the courts to continue in every case to apply an irrebuttable presumption assuming compulsion as a matter of fact, when the actual facts are extremely unlikely to mirror the presumed ones most of the time, seems difficult to justify. *See Coleman v. Thompson*, 501 U.S. 722, 737 (1991) ("Per se rules should not be applied * * * in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time."). Thus, putting entirely to one side the question whether judicially improvised rules that extend beyond constitutional requirements can continue in the face of a contrary Congressional judgment, the *Miranda* Court's 1966 view about the need for a sweeping exclusionary rule has simply become an anachronism.

3. A final reason for granting certiorari is the need to consider the interests of those who are too often "unnamed and unrepresented" in criminal cases: victims of crime. *See Miranda*, 384 U.S. at 543 (White, J., dissenting). The federal courts' failure to implement Section 3501 "may have produced * * * the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens." *Davis v. United States*, 512 U.S. at 465-66 (Scalia, J., concurring). Similar concerns certainly animated the congressional decision to adopt Section 3501. After extensive hearings on *Miranda*'s real world effects, the Senate Judiciary Committee recommended adoption of Section 3501 because "the rigid and inflexible requirements of the majority opinion in the *Miranda* case are * * * extremely harmful to law enforcement." S. REP. NO. 1097, 90th Cong., 2d Sess. at 46, *reprinted in* 1968 U.S.C.C.A.N. at 2132. Congress' finding on this "essentially factual issue" are "of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

More recent empirical scholarship also supports the congressional conclusion, despite what had long been the conventional academic wisdom that *Miranda* had done little to harm law enforcement. An econometric analysis of the precipitous drop in clearance rates (the rates at which police officers solve or "clear" crimes) immediately following *Miranda* found that tens of thousands of crimes go unsolved each year as a result of the decision. Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on*

Law Enforcement, 50 STAN. L REV. 1055 (1998).[6] Similarly, the "before-and-after" *Miranda* data on confession rates strongly suggest the *Miranda* rules have deterred many dangerous criminals from confessing. Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996); *see also* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871-76 (1994) (similar findings). Like the congressional hearings, these studies consider harms beyond the ken of the judiciary; they review data on "lost" criminal cases from *Miranda* — that is, those that can never be prosecuted and thus never reach the courts.

These real world effects lend urgency to reviewing the decision below. For if Congress's factual finding is correct — as this Court must assume, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion) — many dangerous criminals are escaping justice in the teeth of a federal statute that would permit their successful prosecution. *See, e.g., Dickerson*, 166 F.3d at 672.

The Constitution does not require the country to pay this price. It requires the exclusion of compelled confessions, as the law of any civilized nation would exclude them. But it does not require the exclusion of a wrongdoer's voluntary confession -- the most reliable and important evidence available to the criminal justice system. For the judicial branch to reject that evidence when the Constitution demands no such thing was, in the absence of

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[6] The FBI data on which this analysis rests are plotted in Appendix A to this brief.

legislation, an arguably permissible but certainly questionable policy choice from the outset. For it to persist in that rejection in the face of a Congressional directive that voluntary confessions are to be admitted is to maintain that questionable choice after the opportunity for *any* choosing has been closed. By granting review in this case and holding that Section 3501 rather than *Miranda*'s exclusionary rule governs decisions concerning the admission of voluntary confessions, this Court can return the choice to where it belongs: the elected branches. [7]

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[7] WLF also notes that the Department of Justice initially asserted the applicability of Section 3501 in this case in the district court. However, the Department abandoned that argument in the Fourth Circuit, and later joined defendant Dickerson in unsuccessfully urging rehearing en banc of the panel opinion on the ground that the court of appeals could not apply the statute because of its alleged constitutional infirmity. If the Department of Justice continues to adhere to this position — an open question, in light of its statements to the court of appeals and to Congress that it might well take a different view on the question whether *this* Court should apply Section 3501 — or decides not to defend the Fourth Circuit's judgment on the ground that court relied on, this Court would be left without an advocate for the opinion below should it grant the petition. Should that be the case, WLF is willing and prepared to serve as Court-appointed amicus to defend the Fourth Circuit's opinion, if the Court so desires. *See, e.g., Bousley v. United States*, 523 U.S. 614, ___, 118 S.Ct. 1604, 1609 (1998) (appointing *amicus* to brief and argue in support of decision below where the United States disagreed with the court of appeals' analysis); *Bob Jones Univ. v. United States*, 456 U.S. 922 (1982) (inviting an *amicus* to file a brief and argue "in support of the judgments below" where the United States was not prepared to do so).

CONCLUSION

The Court should grant the writ on the issue of the applicability of 18 U.S.C. § 3501 to motions to suppress voluntary confessions in federal court.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Paul G. Cassell
(*Counsel of Record*)
University of Utah College of Law
332 S. 1400 E. Front
Salt Lake City, UT 84112
(801) 585-5202*

Counsel for Amicus Curiae
Washington Legal Foundation

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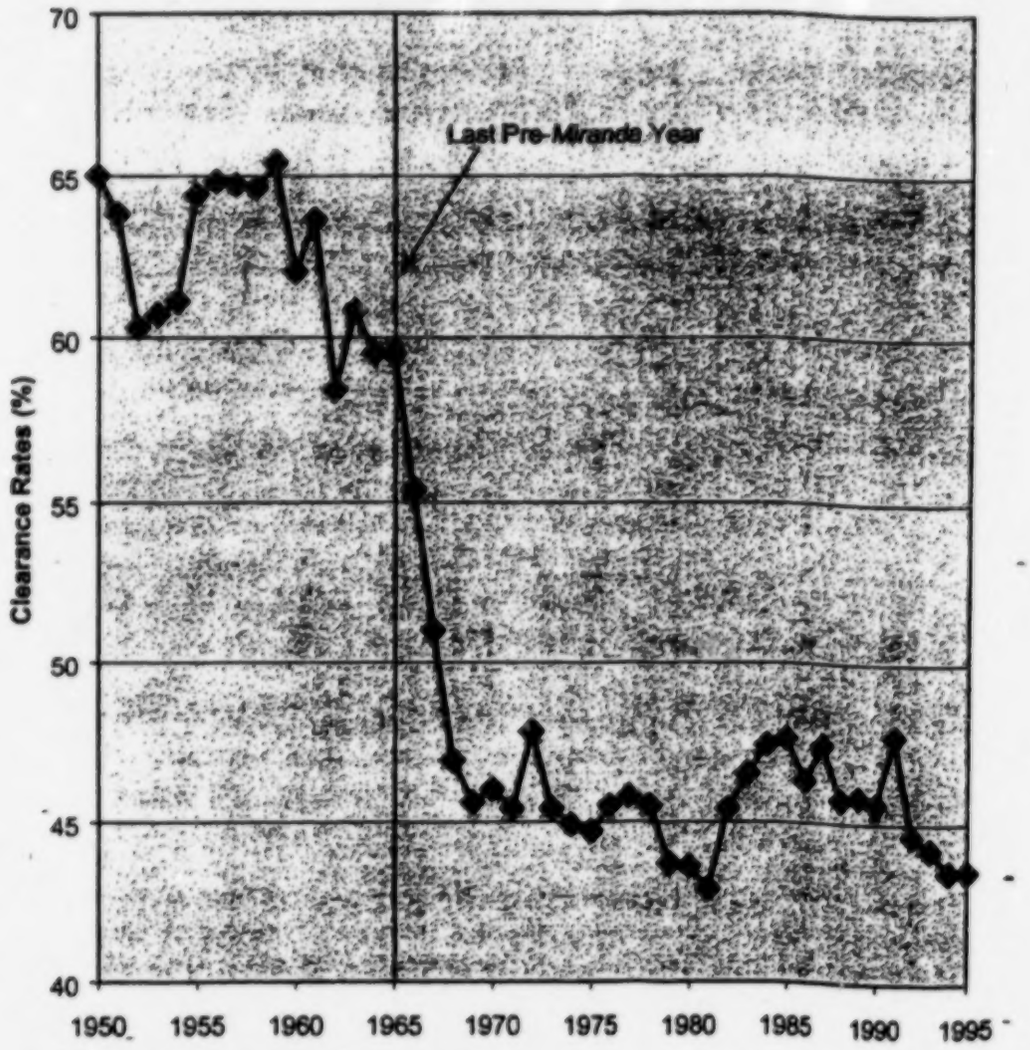
* This business address is not intended to imply institutional endorsement.

Appendix A

Figure 1 - Violent Crime Clearance Rates from 1950 to 1995



This chart, which depicts the Violent Crime Clearance Rates from 1950 to 1995, is reproduced in Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1069 (1998), and is based on information gathered from the *Federal Bureau of Investigation, Uniform Crime Reports* published over the various years.